

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: . Case No. 2:13-md-02460  
. .  
. U.S. Courthouse  
NIASPAN ANTITRUST . 601 Market Street  
LITIGATION . Philadelphia, PA 19106  
. .  
. Friday, April 12, 2019  
. . 9:57 a.m.  
. . . . .

TRANSCRIPT OF TELEPHONE STATUS CONFERENCE  
**BEFORE THE HONORABLE JAN E. DUBOIS**  
**UNITED STATES DISTRICT COURT JUDGE**

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1 (Proceedings commence at 9:57 a.m.)

2 THE COURT: This is Judge DuBois. Good morning.

3 UNIDENTIFIED: Good morning, Your Honor.

4 UNIDENTIFIED: Good morning, Your Honor.

5 THE COURT: We're going to conduct our regularly  
6 scheduled status conference in the Niaspan Antitrust  
7 Litigation, MDL Number 13-2460. I'm not going to call the  
8 roll, but I want to make sure everyone is represented. First,  
9 end-payor plaintiffs.

10 MR. WEXLER: Yes, Your Honor.

11 THE COURT: Fine. Direct-purchaser plaintiffs.

12 MR. SORENSON: Yes, Your Honor.

13 THE COURT: Defendants, AbbVie.

14 MR. SENATOR: Yes, Your Honor.

15 THE COURT: TEVA.

16 MS. ALLON: Yes, Your Honor.

17 THE COURT: Walgreens.

18 MS. RAVKIND: Yes, Your Honor.

19 THE COURT: CVS/Rite Aid.

20 MR. REFSIN: Yes, Your Honor.

21 THE COURT: And Giant Eagle.

22 MR. HILL: Yes, Your Honor.

23 THE COURT: I'm going to start the conference by  
24 referring to a conditional transfer order that was just filed.  
25 It's Document 87, filed today, April 12th. It transfers a case



1 from the Southern District of Ohio. The parties have seven  
2 days to object from the date the conditional transfer order was  
3 filed, and as I said, it was just filed today.

4           Anyone have any comments about this case? The  
5 caption is MSP Recovery Claims, Series LLC and a number of  
6 others versus AbbVie and a number of others. And I think --

7           MR. SENATOR: Your Honor?

8           THE COURT: Yes, go ahead.

9           MR. SENATOR: Sorry. I didn't mean to interrupt.  
10 This is Stewart Senator.

11           THE COURT: No, go ahead, Mr. Senator.

12           MR. SENATOR: So first on the logistics, my  
13 understanding is that the conditional transfer order was filed  
14 by the panel a week ago, and therefore there was one week to  
15 object, and no objections were filed and the order became final  
16 either -- sometime extremely recently. And I got an ECF-type  
17 notice from the JPML this morning that the order was final  
18 (indiscernible) --

19           THE COURT: You know, it's -- I just -- I have two  
20 copies of the conditional transfer order. The first was filed  
21 on April 4th, it's Document Number 85 on iDocket, and the  
22 second was filed April 12th, and it's, as I said, Document  
23 Number 87, and they're identical.

24           But be that as it may, I gather that none of the  
25 parties represented in this telephone conference have any



1 objection to the transfer. If you do have an objection --

2 MR. SORENSON: Your Honor?

3 THE COURT: Yes, go ahead.

4 MR. SORENSON: Your Honor, this is David Sorenson.  
5 I'll speak for myself. I have not seen this order. I don't  
6 know whether any of my colleagues have. My immediate  
7 information is it wasn't filed in a way that was provided to  
8 us, but I'll just say I have not seen it, and I don't know if  
9 any other plaintiffs' counsel have.

10 THE COURT: Well, the way to see it is to download  
11 it.

12 MR. SORENSON: No, understood. What I mean is I'm  
13 just saying that, whatever reason, neither I nor colleagues  
14 have -- got notice of it when it was filed. I'm not sure we  
15 would have, and maybe it's our fault. I'm not saying -- I  
16 don't know. I'm just telling you -- informing you that we have  
17 not seen it. Again, if one of my colleagues on the phone on  
18 the plaintiff side has, I'm -- you know, they can address it.

19 THE COURT: Well, what -- I'm not certain how the  
20 judicial panel handles service of these conditional transfer  
21 orders, but I know they were docketed, and I suggest that you  
22 promptly docket them. And for those of you who want to see  
23 what's going on in the case -- of course, Mr. Senator  
24 is -- well, AbbVie is represented. Are you representing AbbVie  
25 in that case, Mr. Senator? I suspect you are.



1 MR. SENATOR: We will be in this court, Your Honor.  
2 We didn't make an appearance in the Ohio case. The counsel  
3 there served it and then promptly filed a motion to stay it,  
4 pending transfer, which was granted. And then the request to  
5 transfer or the tagalong notice, I'm not exactly sure what it's  
6 called, was filed with the JPML. But we will in your court,  
7 Your Honor.

8 THE COURT: Well, for those of you who are  
9 interested, the case was filed in District Court for the  
10 Southern District of Ohio, and it's Civil Action Number 00892.  
11 The parties are -- and I don't have them all. I have a lot of  
12 the et als., but it's MSP Recovery Claims, Series LLC, and a  
13 number of others, plaintiffs, and AbbVie et al., defendants.  
14 And your rights are established by the rules. And again, act  
15 accordingly, and you're now on notice that these two  
16 conditional transfer orders were filed, one on April 4th, one  
17 on April 12th. But certainly, I --

18 MR. WEXLER: Your Honor?

19 THE COURT: -- can't expect any of the plaintiffs to  
20 say they are or are not objecting when they don't know anything  
21 about it. I suggest that you try to find out about it.

22 MR. WEXLER: Your Honor?

23 THE COURT: Yes, go ahead.

24 MR. WEXLER: I'm sorry to interrupt. This is Ken  
25 Wexler for the end-payors. We're aware of the case. It was



1 filed under the auspices of interim co-lead counsel in the  
2 case. We will reach out to those plaintiffs, which they have  
3 filed in other cases that are pending, and we will address the  
4 issue with them.

5 THE COURT: Mr. Wexler, you --

6 MR. WEXLER: And if you want, we can report to the --

7 THE COURT: -- refer to "other cases that are  
8 pending." Are you talking about other --

9 MR. WEXLER: Yeah.

10 THE COURT: Let me finish. Not -- other Niaspan  
11 cases?

12 MR. WEXLER: No, not Niaspan cases.

13 THE COURT: All right. Because I think --

14 MR. SENATOR: Yes, Your Honor.

15 MR. WEXLER: Yeah.

16 MR. SENATOR: This is Stewart Senator. If I could  
17 just add one thing that might be helpful background. This is  
18 my understanding is that the plaintiffs in the Ohio case are a  
19 subgroup of the proposed EPP class in our case.

20 THE COURT: All right. Thank you, Mr. Senator.

21 All right. I don't think there's anything else we  
22 need to do with respect to the conditional transfer order at  
23 this time. And I gather the plaintiffs move for the -- well,  
24 who moved for the conditional -- or the transfer? Was it the  
25 defense, Mr. Senator, or the plaintiffs?





1 MR. SENATOR: It was the plaintiffs, but I'm not  
2 sure. Technically, I think we may have joined in the notice or  
3 request.

4 THE COURT: Well, what's your --

5 MR. SENATOR: But --

6 THE COURT: Go ahead.

7 MR. SENATOR: And we certainly didn't -- we certainly  
8 don't oppose it. We think, you know, although we don't have  
9 any insight into why they filed the case as a subgroup of a  
10 group that's already before the Court, we were certainly  
11 supportive that everything should be in one place.

12 THE COURT: I am certainly in agreement with that.  
13 Are you aware of any objections among the remaining defendants  
14 in the Ohio case?

15 MR. SENATOR: No, Your Honor. I think the only  
16 defendants in -- well, I think --

17 MS. ALLON: Your Honor, this is Devora Allon for  
18 TEVA. We were the only other defendants, and we also did not  
19 object to the transfer.

20 THE COURT: Thank you very much, Ms. Allon.

21 All right. Well, is -- I don't think there's  
22 anything else that we have to talk about with respect to the  
23 conditional transfer order. And I'll await the  
24 appearances -- the necessary appearances as soon as the  
25 conditional transfer order is served on them.



1           Okay. Let's turn to the agenda.

2           I should tell you that since the last conference, and  
3 particularly in the last, I don't know, seven or eight or nine  
4 days, I've been on trial. I -- as a matter of fact, the jury  
5 just returned a verdict late yesterday, and I have not studied  
6 the class-action submissions. I'm really not up to speed on  
7 the class-action submissions now. There's no way -- going  
8 nine o'clock Eastern to six o'clock Eastern, and that's roughly  
9 what our schedule was -- there's no way I can read the volumes  
10 that you've submitted. So I'm not up to the minute.

11           And as we go through the agenda, we just might end up  
12 having to schedule an early on -- I'm going to call it a  
13 followup telephone status conference. But let's address the  
14 issues as you've presented them.

15           Before we do, though, is there anything you wish to  
16 call to my attention? Hearing nothing, we'll turn to the  
17 agenda.

18           The first item is the format for the hearings on DPP  
19 and EPP motions for class certification. The hearings are  
20 scheduled for May 14th and 15th, and the key question is  
21 whether we have expert testimony. The end-payor plaintiffs  
22 prefer expert testimony. The rest of you either don't think  
23 it's necessary or don't oppose going without expert testimony.  
24 For now, because I haven't really gotten into the motions, I'm  
25 going to suggest that we proceed on the assumption that there



1 will be no expert testimony and that if, during the  
2 proceedings, during the hearing -- hearings, plural -- anyone  
3 decides that expert testimony is required, then I want to hear  
4 about it.

5 And as I said, I have absolutely no problem if that  
6 develops or if I decide, after hearing the arguments, that  
7 expert testimony is required. We'll have a followup hearing.  
8 Right now, we've scheduled two days, May 14th and May 15th, for  
9 the hearings. But there's no reason why, if we need expert  
10 testimony, that we can't schedule a third day of hearings or  
11 more.

12 Also, as I told you in Blood Reagents, we had a need  
13 for expert testimony, expert was unavailable, and we received  
14 his deposition. I found that not quite as helpful as having  
15 the expert in court but nevertheless helpful. So as of today,  
16 no expert testimony.

17 Now, I plan shortly, certainly well in advance of the  
18 hearings, to review your submissions. I haven't totaled the  
19 pages, but they're quite extensive. And if I think, after  
20 reading the submissions, that expert testimony is required, I  
21 will advise you. But for now, do not plan on expert testimony.

22 Anybody want to comment?

23 MS. ALLON: Your Honor --

24 UNIDENTIFIED: Your Honor --

25 THE COURT: Yes?



1 MS. ALLON: -- this is Devora Allon for TEVA. I  
2 actually just had a clarification question, which is if we're  
3 only going to have argument and no testimony for now, should we  
4 consider whether we might only need one day of hearing instead  
5 of two days?

6 THE COURT: I don't know whether we'll need one day  
7 or two days. I certainly am not going to have you convene on a  
8 second day if we don't need you. The reason for scheduling two  
9 days is the fact that I thought when we talked about this that  
10 we might need two days.

11 MS. ALLON: Right. I think when we originally  
12 blocked off the two days, it was because we were uncertain as  
13 to whether we would have live testimony. Certainly, TEVA's  
14 position would be if we're just having arguments, we do not  
15 need two days, and we could work out time limits among the  
16 parties so that we could cover both DPP and EPP class cert. in  
17 one day of hearing.

18 THE COURT: Well, that would be good then.

19 MS. ALLON: We could clear up time for the Court's  
20 calendar.

21 THE COURT: No, that's fine. Among the parties  
22 represented today, and there are seven of you, certainly I'll  
23 hear from the end-payor plaintiffs and the direct-purchaser  
24 plaintiffs and the AbbVie defendants and the TEVA defendants.  
25 What about the Walgreens, CVS/Rite Aid, Giant Eagle?



1           Let's start with you Mr. -- or Ms. Ravkind. Does  
2 Walgreens plan to participate in the argument, or are you going  
3 to be a tagalong?

4           MS. RAVKIND: We do not plan on participating in the  
5 argument. We filed our own separate case, Your Honor, so we do  
6 not plan on participating in the argument. We may attend the  
7 hearing. I don't know whether we will or we won't, but we do  
8 not plan on participating.

9           THE COURT: I don't see, since you've started your  
10 own action -- well, I really haven't -- you're still part of  
11 the class, aren't you?

12           MS. RAVKIND: Well, we -- because class hasn't been  
13 certified, we have not had the opportunity to technically opt  
14 out. However, we did file a separate lawsuit, which is part of  
15 the MDL proceeding before you, on behalf of our clients. So we  
16 represent our clients in their individual capacity and not as  
17 members of the class, Your Honor.

18           THE COURT: Okay.

19           MR. REFSIN: Your Honor, this is Barry Refsin. And  
20 if when -- if the class is certified, direct-purchaser class is  
21 certified, and the class definition includes our claims,  
22 Rite Aid, CVS, and the Walgreens plaintiffs, and I assume Giant  
23 Eagle as well, will opt out of that class.

24           THE COURT: I thought so. But --

25           MR. REFSIN: Sometimes --



1 THE COURT: Go ahead.

2 MR. REFSIN: Sometimes the class is defined to  
3 exclude us, but when it doesn't explicitly exclude us, we opt  
4 out.

5 THE COURT: Well, it seems to me -- well, first of  
6 all, right now, you're all members of the class. I don't know  
7 whether I'm going to certify the class or not. And it seems to  
8 me you have standing to participate in the argument, at least  
9 to object to class certification if you object -- if you have  
10 any objections. But I want your position on the record.

11 And when I talked to you, Ms. Ravkind, I hadn't  
12 really thought this through. But I want you there at the  
13 hearing, and you can put your position on the record. You've  
14 got to tell me whether you have any objections to the class  
15 certification, knowing that if the class is certified, you've  
16 told me that Walgreens will opt out.

17 All right. Is there anything more? Well, before we  
18 finish on the two days versus one day, I gather that any  
19 participation by Walgreens, CVS/Rite Aid, Giant Eagle, will be  
20 brief. Is that a fair statement? Does anyone disagree with  
21 that?

22 MR. REFSIN: That's correct, Your Honor.

23 THE COURT: How long do you think -- have you given  
24 any thought to scheduling the argument and figuring out who's  
25 going to speak for how long?



1 MR. SORENSON: Your Honor, this is David Sorenson for  
2 the direct-purchaser class. If I may start with that.

3 THE COURT: You may.

4 MR. SORENSON: I had suggested on the last call that  
5 the direct-purchaser class mission be taken up first because I  
6 think the issues are fairly straightforward, and relatively  
7 speaking, simpler. I recall that my colleague, Ken Wexler, I  
8 think, had mentioned a scheduling issue that the indirects were  
9 facing. I don't know if that still pertains. But if you  
10 decide on one day, let's say the 14th, I would suggest that the  
11 direct purchaser motion be taken up first. I think it will be  
12 shorter and simpler.

13 I can certainly talk to the defendants about a time  
14 limit. I would think total for each side on the order of an  
15 hour is more than sufficient, but I will say that I haven't  
16 talked to the defendants directly about this, so I don't want  
17 to hold them to any particular number. But that's just  
18 my -- you know, my sense of things.

19 So if that went forward at ten o'clock, let's say,  
20 the direct class submission could be finished by the lunch  
21 break, assuming Your Honor takes a lunch break, and we could  
22 have the afternoon, as much as Your Honor, you know, would  
23 like, and your own schedule to deal with the impaired motion.  
24 That's, you know, sort of my impression of how this might go.

25 MS. ALLON: And Your Honor, this is Devora Allon for



1 TEVA. I agree with Mr. Sorenson about the time needed for the  
2 direct-purchaser motion. I think an hour per side sounds  
3 reasonable.

4 THE COURT: All right. Well, but I think you ought  
5 to talk among yourselves. I haven't heard from Mr. Senator on  
6 this. And the Walgreens, CVS/Rite Aid, Giant Eagle plaintiffs  
7 ought to decide whether they believe it necessary to say  
8 anything at the hearing.

9 And what I've decided I have to do, I have to get  
10 more familiar with the issues in the -- raised in the class  
11 certification motions. So we're going to have another  
12 conference before the hearing. And I want -- before that  
13 conference, I want you to meet and confer and come up with a  
14 proposed schedule for one day of hearings. And I should think  
15 you'd be able to do that in a week. Is that agreeable  
16 to -- well, does anyone disagree with that?

17 MR. WEXLER: Your Honor, hi. This is Ken Wexler.  
18 Before -- obviously, we're perfectly willingly to meet and  
19 confer and discuss the time limits and whatnot and trying to do  
20 those in one day, but could you not jettison the second day yet  
21 until we have had that opportunity?

22 THE COURT: I'm not jettisoning -- my gosh, that's a  
23 tough word. You better find another word. How about --

24 MR. WEXLER: That's okay.

25 UNIDENTIFIED: Pick another one.





1 MR. WEXLER: It was serendipity that I was able to  
2 get it out.

3 THE COURT: Well, I'm having -- I just came from the  
4 gym. I am fairly tired. And I've got to tell you, jettisoning  
5 -- I can't even get it out. Scrapping. That's --

6 MR. WEXLER: We know what you mean.

7 THE COURT: The second day of hearings --

8 UNIDENTIFIED: Don't scrap the day, Your Honor.

9 THE COURT: I get it. The second day of hearings is  
10 not scrapped yet. And as I said, we're going to have another  
11 conference before those hearings. I've got to get a better  
12 handle, as I said a moment ago, on the issues raised in the  
13 class certification motions.

14 And the same is true of page limitations. I have  
15 thought less is more. I've always thought that. I don't think  
16 either of your proposals, the proposals set forth in the  
17 addendum, are in the less category. But there's a lot of  
18 reading to do right now, and I want to think about -- and  
19 really I want to canvass my colleagues. I haven't imposed page  
20 limits, and I really suffered as a result. The volumes that  
21 have been dropped on us have been unbelievable, and -- well,  
22 maybe not unbelievable to you. But really when you think there  
23 are two of us, and how many, many more of you, it's quite a  
24 problem.

25 Again, less really is more. It's much easier to



1 grasp and much more difficult to write a good, short brief than  
2 any kind of a longer brief. So I want to defer on that as  
3 well. But I want to get you notice quickly because I'm sure  
4 you're going to start working on the summary judgment motions.

5 I think now because we've deferred on page limits, a  
6 final word on the schedule and the -- really the format for the  
7 hearings as well, we ought to turn to the scheduling of the  
8 next conference. And I just want enough time to read the class  
9 action submissions and any other submissions. And it looks  
10 like my schedule -- well, I've got one day of hearings. A lot  
11 of conferences but no trials and no hearings. And a trial the  
12 following week, but it's not going to last. It's a criminal  
13 case.

14 So I'm thinking we ought to try to schedule something  
15 around the end of next week -- not next week. I'm sorry. The  
16 end of the following week. The -- I'm just looking to see  
17 about criminal cases. Or the beginning of the next week, the  
18 week of the 29th. That --

19 MR. WEXLER: Your Honor?

20 THE COURT: Yeah?

21 MR. WEXLER: Ken Wexler here.

22 THE COURT: Yes?

23 MR. WEXLER: I have knee surgery on the 30th, so if  
24 we could do it the 29th, that would be great.

25 THE COURT: Well, I wish you well on your knee



1 surgery.

2 MR. WEXLER: Or while I'm under anesthetic. I might  
3 be more coherent.

4 THE COURT: I wish you well on the --

5 MR. SENATOR: I second that.

6 THE COURT: Well, then we'll do it on the 30th,  
7 Mr. Senator, or better still, on May 1st. I haven't had knee  
8 surgery, but the next -- the day after, I'm told, is much less  
9 harsh now today than it was years ago. They've really  
10 perfected the knee and hip surgery. I've had two hockey-player  
11 sons have hips replaced, and one was treated as an inpatient  
12 [sic], I couldn't believe that. The other spent one day in the  
13 hospital. And I wish you well. I hope you get in and out  
14 quickly and it's uneventful.

15 But we can do it the 29th. Michael, that case is  
16 going to be continued because the defendant has fired his  
17 lawyer. Do you know anything about the rescheduling?

18 THE COURT RECORDER: I do not.

19 THE COURT: All right. Well, let's do it -- can we  
20 do it later on the 29th in case I have to have a continuance  
21 hearing that morning, say three o'clock?

22 MR. SENATOR: Fine with us.

23 MR. WEXLER: Yeah, fine with us, Your Honor.

24 THE COURT: All right. 3 p.m. on Monday, the 29th.  
25 Who will initiate?



1 MR. WEXLER: I will, Your Honor.

2 UNIDENTIFIED: We can't -- okay. go ahead.

3 MR. WEXLER: Yeah, this is Ken Wexler. We  
4 can -- yeah, it's our turn.

5 THE COURT: Okay. Good. We'll address all of the  
6 issues that we haven't addressed today, I'll include that in  
7 the order, and any new issues, the order will provide for the  
8 submission of a proposed agenda, no less than three days in  
9 advance. And hopefully we'll have answers -- better answers  
10 certainly on expert witnesses, but page limitations I think  
11 we'll be better on, and I hope to be able to finalize that.

12 Is there anything else that we need to address now?  
13 Hearing nothing, I'll end the conference. I'll issue an order  
14 scheduling the next conference for Monday, April 29th at  
15 3 p.m., and Mr. Wexler will initiate.

16 All right. Have a good weekend, everybody. Thank  
17 you very much for participating. I look forward to chatting  
18 with you on April 29th.

19 UNIDENTIFIED: Thank you, Your Honor.

20 UNIDENTIFIED: Thank you.

21 UNIDENTIFIED: Thank you.

22 UNIDENTIFIED: Appreciate it.

23 THE COURT: Bye now.

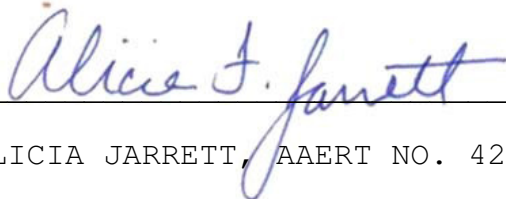
24 (Proceedings concluded at 10:26 a.m.)

25 \* \* \* \* \*



C E R T I F I C A T I O N

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ALICIA JARRETT, AAERT NO. 428

DATE: April 22, 2019

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